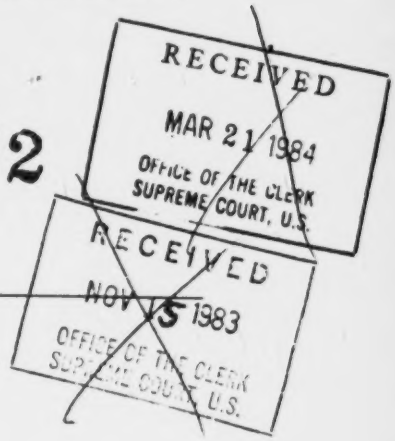
No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL 83-6452



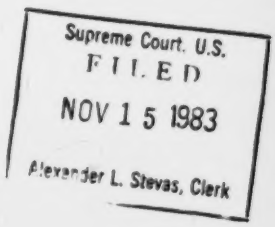
GEORGE DAVID TOKMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.



PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether infliction of the death penalty on an adolescent under the age of 18 at the time of the offense constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

2. Whether, in a capital case, the Eighth and Fourteenth Amendments prohibit an instruction to the jury that it may find two aggravating circumstances where the facts permit a finding of only one such circumstance.

3. Whether the Eighth and Fourteenth Amendments were violated when the jury was instructed that petitioner could be sentenced to death upon a finding that the offense was "especially heinous, atrocious or cruel," without any additional guidance provided to the jury as to the meaning of that phrase.

4. Whether the Sixth and Fourteenth Amendments were violated by the exclusion for cause of a juror who indicated that he could impose the death penalty in an appropriate case even though he harbored conscientious scruples against the death penalty in general.

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Petitioner George David Tokman prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming petitioner's conviction of capital murder and sentence of death by lethal gas is officially reported at 435 So.2d 664 (1983), and is reproduced in the appendix to this petition at pp. A. 1-18.[1/]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on June 1, 1983, and a timely petition for rehearing was denied on August 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

[1/] Numbers preceded by "A." refer to pages of the Appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

2. The Sixth Amendment to the Constitution of the United States which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a ...trial, by an impartial jury....

3. The Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No state shall...deprive any person of life, liberty or property without due process of law.

4. This case also involves the provisions of Miss.Code Ann. Sec. 99-19-101 (1972 & Supp. 1982), which are set forth in the Appendix to this petition (A. 19-21).

STATEMENT OF THE CASE

On August 24, 1980, Albert Taylor, a taxicab driver in Jackson, Mississippi, died as the result of blows to the head by a blunt instrument inflicted during the course of a robbery. (A. 1.) A petit jury in the Circuit Court of the First Judicial District of Hinds County, Mississippi, subsequently convicted petitioner George David Tokman of the capital murder of Mr. Taylor, and sentenced petitioner to death. (Id.)

As the case comes to this Court, the Supreme Court of Mississippi has sustained petitioner's sentence of death against challenges (1) that a sentence of death is constitutionally impermissible in light of the fact that petitioner was 17 years of age at the time of the offense (A. 12-13);[2/] (2) that the jury was unconstitutionally permitted to find two statutory aggravating circumstances from evidence which allowed a finding of only one such circumstance (A. 7-8); (3) that the jury was unconstitutionally instructed that petitioner could be sentenced to death upon a finding that the offense was

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[2/] The opinion of the Mississippi Supreme Court poses this issue as whether, in light of petitioner's youth, "the sentence of death imposed by the jury was contrary to the weight of the evidence and disproportionately severe for the crime committed." (A. 12). However, petitioner's request for rehearing in the Mississippi Supreme Court specifically framed the question whether "the death sentence should be reversed because [petitioner] was seventeen years old at the time of the crime," Petition for Rehearing, p. 3, and the issue is thus properly raised here. Hathorn v. Lovorn, 457 U.S. 255 (1982).

"especially heinous, atrocious or cruel," without any additional guidance provided as to the meaning of the phrase "especially heinous, atrocious or cruel" (A. 8-10); and that a prospective juror was unconstitutionally excused for cause after he initially indicated on voir dire that he harbored conscientious scruples against infliction of the death penalty, but later stated that he could vote to impose the death penalty in an appropriate case (A. 3-4).

In view of the Mississippi Supreme Court's findings and conclusions, a detailed statement of the facts and proceedings is unnecessary for consideration of the issues presented herein. Additional aspects of the proceedings below are developed with the discussions of these issues where helpful.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Supreme Court of Mississippi.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER INFLICTION OF THE DEATH PENALTY ON AN ADOLESCENT UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner was 17 years of age at the time of the commission of the offense for which he was sentenced to die. In light of the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1959), petitioner asserts that Mississippi should be precluded by the Eighth and Fourteenth Amendments to the Constitution from inflicting the penalty of death upon an adolescent who was under the age of 18 at the time of the commission of his offense.

The question is manifestly a substantial one. This Court has frequently stated that the youth of the offender is an appropriate mitigating factor in capital cases. Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633, 636-637 (1977); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976). And in Eddings v. Oklahoma, 455 U. S. 104 (1981), the Court granted certiorari to consider the question whether infliction of the death penalty on a child who was sixteen at the time of the crime

constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.

However, the Court in Eddings reserved resolution of the question upon a holding that the case should be remanded for a second sentencing proceeding in conformity with Lockett v. Ohio, supra; the majority in Eddings simply restated the principle that the "chronological age of a minor is itself a relevant mitigating factor of great weight...." 455 U. S. at 116. In a separate concurring opinion, Justice O'Connor stated this view of the majority's holding:

> I...do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16. [Id. at 119.]

As one commentator has observed, "[t]he constitutional question is thus left in limbo." Streib, Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen 16 (1983).[3/] Petitioner submits that the question should now be removed from "limbo," and definitively answered by this Court.

It is, of course, clear that in non-capital contexts, the Eighth Amendment places substantive limits on the power of the state to impose a sentence that is disproportionate to the severity of the offense, Soler v. Helms, ___U.S.___ (1983), and that in capital cases, too, the Eighth Amendment may prohibit the infliction of death as cruel and unusual punishment for certain offenses. Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape is excessive and grossly out of proportion to the crime). In Coker, the Court determined that the punishment of death for rapists was constitutionally excessive by looking to objective factors such as "public attitudes concerning a particular sentence, history and precedent, legislative attitudes and the response of juries reflected in their sentencing decisions." Id. at 592. All of those factors likewise militate toward the conclusion that imposition of the death penalty on children and adolescents is constitutionally impermissible.

[3/] Professor Streib's article will be published in a forthcoming issue of the OKLAHOMA LAW REVIEW.

In Gregg v. Georgia, supra, the Court observed that the response of state legislatures to Furman v. Georgia, 408 U. S. 238 (1972), is "the most marked indication of society's endorsement of the death penalty." 428 U.S. at 179. By that measure, societal endorsement of the death penalty for juveniles is lukewarm, at best. Of the thirty-seven presumptively valid death penalty statutes now on the books, eight prohibit execution of offenders whose crimes were committed under the age of sixteen,[4/] seventeen[5/] or eighteen,[6/] while nineteen other statutes expressly designate the offender's youth as a mitigating factor.[7/] Thus, a strong majority of the states which have enacted death penalty statutes after Furman v. Georgia have mandated either that youth is a decisive factor in capital cases and that accordingly the death penalty may not be inflicted as a punishment on young people under certain ages,[8/] or that youth is an important mitigating circumstance to be considered in such cases.[9/]

[4/] NEV. REV. STAT. Sec. 175.025 (1973 & Supp. 1977).

[5/] TEXAS PENAL CODE ANN., tit. 2, §8.07(d) (Vernon Supp. 1980-1981).

[6/] CAL. PENAL CODE §190.5 (West Supp. 1980); COLO. REV. STAT. §16-11-103(5)(a)(1978); CONN. GEN. STAT. ANN. §53a-46a(f)(1)(West Supp. 1980); and ILL. REV. STAT. ch. 38, §9-1(b)(Smith Hurd Supp. 1978); OHIO REV. CODE §2929.02 (Page 1982); TENN. CODE ANN. §37-234(a)(1).

[7/] 1981 ALA. ACTS, §13(g); ARIZ. REV. STAT. §13-703G.5 (Supp. 1980); ARK. STAT. ANN. §41-1304(4) (Supp. 1979); FLA. STAT. ANN. §921.141(6)(g) (West Supp. 1981); KY. REV. STAT. §532.025(b)(8) (Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.5(f) (Supp. 1981); MD. CRIM. LAW CODE ANN. §413(g)(5) (Supp. 1980); MISS. CODE ANN. §99-19-101(6)(g) (Supp. 1982); MO. REV. STAT. §565.012 (3)(7) (Supp. 1981); MONT. REV. CODES ANN. §46-18-304(7) (1979); NEB. REV. STAT. §29-2523(2)(d)(1979); N.H. REV. STAT. ANN. §630:5 II (b)(5) (Supp. 1979); N.M. STAT. ANN. §31-20A-6 I (Supp. 1980); N.C. GEN. STAT. §15-A-2000(f)(7) (Supp. 1979); 18 PA. CONS. STAT. ANN. §1311(e)(4) (Purdon 1980); S.C. CODE §16-3-20(c)(b)(7) (Supp. 1980); UTAH CODE ANN. §76-(a)(b)(7) (Supp. 1979); VA. CODE §19.2-264(B)(V) (Supp. 1980); WYO. STAT. ANN. §6-4-102(j) (vii) (Supp. 1980).

[8/] The Model Penal Code likewise rejects capital punishment for offenders under the age of eighteen. MODEL PENAL CODE Sec. 210.6(1)(d) (Proposed Official Draft, 1962).

[9/] No state has enacted a death penalty statute that excludes youth as a mitigating factor.

Furthermore, actual executions of persons under the age of 20 have become quite rare. Prior to 1950, 229 teenagers were executed out of 2,678 executions with available age data; however, since 1950, only 26 teenagers have been executed out of 450 executions with available age data. W. BOWERS, EXECUTIONS IN AMERICA (1974). No person under age 18 has been executed since 1964--almost 20 years ago. Steib, supra at 12.

The international community has condemned executions of young people as well. The Royal Commission on Capital Punishment provided this description of the decline of such executions in England.

> The Children Act, 1908, provided that a person under 16 years of age at the time of conviction should not be sentenced to death but should instead be sentenced to be detained during His Majesty's pleasure. This provision, which applied both to England and Wales and to Scotland, was extended by the Children and Young Person act, 1933...to persons under 18 at the time of conviction; and was further extended by section 16 of the Criminal Justice Act, 1948...to persons under 18 at the time when the offense was committed. No person under 18 years of age had in fact been executed since 1887.

ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT 1949-195 3 64-65 (1953). And on October 5, 1977, President Carter signed the International Covenant on Civil and Political Rights which provides, in Part III, Art. 6, Cl. 5 that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...."[10/]

Since this Court pretermitted decision of the question in Eddings v. Oklahoma, supra, public and professional opinion has continued to coalesce against infliction of the death penalty on juvenile offenders. For example, on August 2, 1983, the House of Delegates of the American Bar Association enacted a resolution which

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[10/] The Covenant has been signed and/or ratified by 73 nations. Many countries have specifically prohibited execution of persons under the age of eighteen, including Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Soviet Union, United Kingdom of Great Britain and Northern Ireland, Antigua, Bahamas, British Virgin Islands, Dominica, Grenada, Guyana, New Zealand, Guatemala and South Africa. Amnesty International Report, THE DEATH PENALTY, ADDENDA AND UPDATE 59-156 (1979).

stated that "the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." The report which accompanied the ABA resolution observed, at p. 10, that "[t]he notion of a governmental agency imposing the death penalty upon a child through its justice proceedings raises the deepest questions about the demands of justice versus the special nature of childhood." 11/

Petitioner urges this Court to provide an answer to those questions, as they apply to him and to the some 25 other young people currently on death row for crimes committed while under the age of 18. 12/ The Eighth Amendment should be construed to eliminate from the controversy over capital punishment any notion that we are willing, as a people, to execute our children and adolescents. Infliction of the death penalty on juveniles is cruel because of the unique manner in which the law of this country has historically treated young people, 13/ and it is unusual because of its rarity in practice and its widespread condemnation. This Court should grant certiorari in this case and settle the issue once and for all.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, IN A CAPITAL CASE, THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT AN INSTRUCTION TO THE JURY THAT IT MAY FIND TWO AGGRAVATING CIRCUMSTANCES WHERE THE FACTS PERMIT A FINDING OF ONLY ONE SUCH CIRCUMSTANCE

11/ The ABA is not alone in condemning application of the death penalty to young people. See, e.g., Editorial, "Capital Punishment for Kids?," The Washington Post A18 (November 8, 1983).

12/ There are presently between 20 and 25 young people under death sentences for crimes committed while under the age of 18. "25 Juveniles on Death Row; Should Age Barriers Be Set?", The National Law Journal 16 (August 8, 1983).

13/ This Court's opinions, for example, have often recognized "the peculiar vulnerability of children," and "their inability to make critical decisions in an informed, mature manner." Bellotti v. Baird, 443 U. S. 622, 634 (1979) (plurality opinion). Moreover, the Court has not limited its view of the vulnerabilities of age to young children: "Most children, even in adolescence, simply are not able to make sound judgments...." Parham v. J.R., 442 U. S. 584, 603 (1979). See also, e.g., Haley v. Ohio, 332U.S. 596 (1948).

Miss. Code Ann. Sec. 99-19-101(2)(b) provides that in a capital case the jury shall determine "[w]hether sufficient mitigating circumstances exist...which outweigh the aggravating circumstances found to exist...." Section 99-19-101(5)(d) lists as an aggravating circumstance whether "[t]he capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit...any robbery," and Section 99-19-101(5)(f) lists as another aggravating circumstance whether "[t]he capital offense was committed for pecuniary gain." In petitioner's case, the jury was instructed that because the homicide at issue occurred during the course of a robbery, the jury could find the existence of two aggravating circumstances under both Sections 99-19-105(d) and (f), and that it could then weigh both aggravating circumstances against whatever mitigating circumstances might appear.

Petitioner argued to the Mississippi Supreme Court that the instruction "was improper because it permitted the * * * doubling of aggravating circumstances (saying the same thing twice) when the evidence would permit only one aggravating circumstance." (A. 7.) The court simply rejected petitioner's argument with a non sequitur: "...we think an indictment, as here, charging capital murder in the course of a robbery permits instructions on both 'robbery' and 'pecuniary gain' as aggravating circumstances because the evidence supports both as it reveals the robbery was committed for pecuniary gain during the course of which the homicide occurred." (Id.)[14/]

Clearly the more sensible view is that reflected in Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978), where the court, construing an identical statutory scheme, found it impermissible to "in effect condemn...[a defendant] twice for the same culpable act--stealing money." See also Provence v. State, 337 So.2d 783, 786 (Fla. 1976), where the court said, in construing another identical statutory scheme, that while in some cases the two aggravating factors might legitimately:

[14/] The court did not explain how a murder occurring in the course of a robbery could not be committed for pecuniary gain. Of course, it is obvious that all murders committed for pecuniary gain do not occur in the course of robberies--e.g., so-called "contract killings."

> ...refer to separate analytical concepts and...validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, we believe that [defendant's] pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case. [Emphasis in original; citation omitted.]

This Court has repeatedly emphasized that the Eighth and Fourteenth Amendments do not permit a sentence of death to be imposed in an arbitrary and capricious manner. E.g., Gregg v. Georgia, supra; Proffitt v. Florida, 428 U.S. 242 (1980); Furman v. Georgia, supra. It is difficult to imagine a more arbitrary and capricious instruction than one which tells a jury that even though the facts reveal the presence of only one statutory aggravating circumstance, the jury is nevertheless free to find the presence of two such circumstances, and to weigh them both in the life or death balance. Consequently, the Court should grant certiorari to decide whether petitioner was deprived of a fair sentencing proceeding by this instruction.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE JURY WAS INSTRUCTED THAT PETITIONER COULD BE SENTENCED TO DEATH UPON A FINDING THAT THE OFFENSE WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL," WITHOUT ANY ADDITIONAL GUIDANCE PROVIDED TO THE JURY AS TO THE MEANING OF THAT PHRASE

The jury in petitioner's case was instructed, pursuant to Miss. Code Ann. Sec. 99-19-101(5)(h), that petitioner could be sentenced to death if the jury found that "[t]he capital offense was especially heinous, atrocious or cruel;" the trial court, however, did not provide the jury with any explication at all of the meaning of the phrase "especially heinous, atrocious or cruel." The Mississippi Supreme Court subsequently rejected petitioner's contention that "these words are unconstitutionally vague and ambiguous" (A. 8), as well as his argument that "[t]he finding of the jury that the

capital murder was especially heinous, atrocious or cruel is...without evidentiary foundation and contrary to the overwhelming weight of the evidence" (A. 9).

This phrase has had a checkered history in death penalty litigation. See, e.g., People v. Superior Court (Engert), 31 Cal. 3d 797, 183 Cal. Rptr. 800, 647 P.2d 76 (1982) (provision of California's death penalty statute making heinousness or atrociousness of crime an aggravating circumstance void for vagueness on ground that words have no directive content). The facial constitutionality of similar phraselogy was upheld by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), but only with the caveat that a solution to the inherent imprecision of the statutory language must be provided either through limiting jury instructions by trial courts, or by appellate court review of the applicability of the phrase to the facts of particular cases. Thus, in Gregg the Court declined to hold that this statutory phrase would always be found constitutional, and warned against its being given an "open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.).

The language next came before the Court in Godfrey v. Georgia, 446 U. S. 420 (1980), where the Court concluded that a death sentence was constitutionally infirm because it was "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman." Id. at 428 (footnote omitted). The Court explained that:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the statutory] terms. In fact, the jury's interpretation of [the statutory language] can only be the subject of sheer speculation. [Id. at 428-429.]

Likewise in petitioner's case, the jury's interpretation of the "especially heinous, atrocious or cruel" language of Section 99-19-101(5)(h) could only have been entirely speculative. To be sure, in Washington v. State, 361 So.

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2d 61, 65 (Miss. 1978), the Supreme Court of Mississippi held that the phrase is "not confusing nor likely to be misunderstood by the average citizen" because "[h]e comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio, or the press." However, a capital sentencing scheme which is so amorphous as to turn upon jurors' presumed "contact" with crucial statutory language in "the news media of television, radio or the press" is patently insufficient to ensure a rational sentencing decision based upon clear and objective standards.

Moreover, the trial court's failure to give a limiting instruction was particularly mystifying in light of the fact that the Mississippi Supreme Court placed a limiting construction on Section 99-19-101(5)(h) in Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979), where, in the course of a terse two-paragraph passage rejecting a vagueness attack on the section, the court quoted with approval Spinkellink v. Wainwright, 578 F. 2d 582, 611 (5th Cir. 1978), to the effect that the language of the section denotes "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Compare Profitt v. Florida, 428 U.S. 242, 255-256 (1976). Four members of the Mississippi Supreme Court have recently concluded that because "[i]t is obvious that the average juror does not know our own narrow construction of the phrase 'especially heinous, atrocious or cruel,'" a capital sentence rendered by a jury which was not provided with a limiting instruction on this language cannot pass constitutional muster under the standards of Godfrey v. Georgia, supra. Edwards v. Mississippi, S. Ct. Miss. No. 53,800 (en banc)(disssenting opinion of Prather, J., joined by Patterson, C.J., Hawkins and Roberton, JJ.) (slip op. at 15). This Court should grant certiorari to decide the substantial constitutional question which was posed by the Edwards dissenters, and which was decided adversely to petitioner in this case. 15/

15/ Petitioner concedes that even if the "especially heinous, atrocious or cruel" aggravating circumstance, as well as one of the two aggravating circumstances which were impermissibly doubled (see pp. 7-9, supra), were eliminated from the case, there nevertheless would remain two aggravating circumstances found by the jury which are not attacked in this petition. However, given the fact that the jury in petitioner's case did not find the total absence of mitigating circumstances, but rather simply found that the aggravating circumstances outweighed the mitigating circumstances which were present, vacation of the death sentence in this case would be required even under the teaching of Zant v. O'Daniel, __U.S.__(1983), and Barclay v. Florida, __U.S.__(1983). See Edwards v. Mississippi, supra (dissenting opinion of Prather, J., joined by Patterson, CL.J. Hawkins and Roberts, JJ.). That is especially so in light of the presence in this case of one very strong mitigating factor, i.e., petitioner's youth. See dissenting opinion of Hawkins, J., joined by D. Lee, J., pp. A. 16-18.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE EXCLUSION FOR CAUSE OF A JUROR WHO INDICATED THAT HE COULD IMPOSE THE DEATH PENALTY IN AN APPROPRIATE CASE EVEN THOUGH HE HARBORED CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IN GENERAL

During the voir dire in this case, a prospective juror, Mr. Dewitt Jordan, indicated that he held conscientious scruples against infliction of the death penalty. However, under questioning by petitioner's trial counsel, the following colloquy ensued:

> BY [DEFENSE COUNSEL]:
>
> * * * Mr. Jordan, with respect to the death penalty, you understand that, if you serve on the jury and find the Defendant guilty, you go into the second phase but it does not necessarily mean under the law that you have to give him the death penalty. You understand that, don't you?
>
> BY MR. JORDAN:
>
> Yes, sir.
>
> BY [DEFENSE COUNSEL]:
>
> Now, you indicated that it would be difficult for you or you didn't think you could or whatever but I'll ask you whether or not in your mind there is no case, no matter what type the crime or how vicious or whatever it is, you could not vote for the death penalty.
>
> (No response)
>
> BY [DEFENSE COUNSEL]:
>
> Think about it if you will. Not this case but any case.
>
> BY MR. JORDAN:
>
> It might depend.
>
> BY [DEFENSE COUNSEL]:
>
> Pardon me?
>
> BY MR. JORDAN:
>
> It might depend.

BY [DEFENSE COUNSEL]:

It might depend?

BY MR. JORDAN:

Yes.

BY [DEFENSE COUNSEL]:

So there is the possibility that you could vote for the death penalty in a case if the facts warranted in your mind the crime was heinous enough or bad enough.

BY MR. JORDAN:

Yes, sir. [16/]

Nevertheless, despite Mr. Jordan's agreement that he was not so opposed to capital punishment that he could never inflict it on a defendant, Mr. Jordan, over petitioner's objection, was excused for cause.

In Witherspoon v. Illinois, 391 U. S. 510, 523 n. 21 (1968), this Court said that under the Sixth and Fourteenth Amendments:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out... [Emphasis in original.]

Compare Adams v. Texas, 448 U.S. 38 (1980). Certiorari should be granted so that the Court might decide whether petitioner was deprived of a fair and impartial jury by exclusion of this member of the venire.

CONCLUSION

For all of the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

16/ Trial Transcript, pp. 223-224.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,676

GEORGE DAVID TOKMAN

v.

STATE OF MISSISSIPPI

EN BANC.

PATTERSON, CHIEF JUSTICE, FOR THE COURT:

George David Tokman appeals a conviction of capital murder and sentence of death by a jury in the Circuit Court of the First Judicial District of Hinds County. It is a companion case to Leatherwood v. State, No. 53,914 (Miss., decided May 25, 1983, not yet reported).

Shortly after midnight on August 24, 1980, Sergeant Addison of the Jackson Police Department observed a Veterans Cab parked behind Meadowbrook Cinema. Lying beside the cab was the body of a black male, later identified as that of Albert Taylor, 65 years of age. An autopsy revealed his death resulted from blows to the head by a dull blunt instrument. Other investigation disclosed a latent fingerprint taken from the right rear window of the cab matched that of Tokman.

Diane Pettway, a nurse at Regional Medical Center in Vicksburg, testified that on August 24, 1980, at approximately 1:30 a.m., three white males came into the emergency room of the center and one, who identified himself as George David Tokman, age 17, had blood on his clothes and a cut on his hand. She testified Tokman was treated by placing five stitches in his right hand between the knuckle and the wrist.

Jeffery Booth testified that on August 29, 1980, while in the Army and stationed at Fort Polk, Louisiana, he was associated with George David Tokman, Michael Leatherwood and Jerry Fuson. He stated that Tokman told him that he, Leatherwood and Fuson had killed a cab driver in Jackson, Mississippi. According to him, Tokman displayed a newspaper account of the murder and bragged of the incident.

More detailed facts of the crime were established by the testimony of Jerry Booth, James Kellison, also stationed at Fort Polk, and Jerry Fuson.

On or about August 22, 1980, Tokman, Fuson and Leatherwood, all in the military and stationed at Fort Polk, Louisiana, were in Jackson, Mississippi, to obtain Fuson's car which had been previously left in the city. After remaining in Jackson for about a day and a half the three decided they would rob a cab driver since they were without funds. According to Fuson's testimony Leatherwood and Tokman decided they would kill the victim. The first cab called was driven by a young, large driver who they thought would be difficult to manhandle so a second cab was called which was driven by Albert Taylor, an elderly man.

The three entered Taylor's cab, with Fuson occupying the passenger's side of the front seat, Leatherwood occupying the left side of the rear seat and Tokman occupying the right side of the rear seat. They directed the driver to an address on Beaverbrook and upon arriving there requested him to dim his lights whereupon Leatherwood placed a rope around the driver's neck and pulled him into the back seat. Meanwhile Fuson stopped the cab and Tokman came to the driver's seat and drove the cab to the rear of Meadowbrook Cinema. Fuson then left the cab to obtain his car and upon returning for Leatherwood and Tokman observed that Tokman's hand was cut. After departing the scene Leatherwood made the statement that Tokman stabbed him, not denied by Tokman, and later Tokman stated

that he had cut his hand while stabbing the cab driver. Further evidence revealed that Taylor was robbed of approximately $11.50, a pistol, his wallet, two money bags and a set of keys.

Tokman first contends the trial court erred in granting the state's challenge to venireman Dewitt Jordan for cause. He argues this was error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Jordan expressed conscientious scruples against the death penalty during voir dire of the jury by the prosecution. Later the court, after explaining that the first part of the trial dealt only with the guilt or innocence of the defendant and not with the imposition of the death penalty, asked the following question: "That is, during the first phase, could you still vote guilty even though that could result in the death penalty after the jury considers it in the second phase?" Jordan replied, "I don't think I could." When asked by the prosecution whether it was correct that he was saying that he could not vote guilty knowing it could result in the death penalty Jordan replied, "Yes, sir."

In Evans v. State, 422 So. 2d 737 (Miss. 1982), we reiterated the procedures we had approved in Irving v. State, 361 So. 2d 1360 (Miss. 1978). We there stated:

> Following Witherspoon, this Court considered the procedure to be employed by trial judges in Myers v. State, 254 So. 2d 891 (Miss. 1971). That procedure follows:
>
> "'The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions

of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.' (Emphasis added). Armstrong v. State, Miss., 214 So. 2d 589, at 593." 254 So. 2d at 893-94. [361 So. 2d at 1360].

422 So. 2d at 740-41.

The trial court meticulously followed the procedure outlined in Evans although the prospective juror was somewhat rehabilitated by questions of defense counsel, one of which was,

"BY MR. MOORE: So there is the possibility that you could vote for the death penalty in a case if the facts warranted in your mind the crime was heinous enough or bad enough.

BY MR. JORDAN: Yes, sir."

Nevertheless, a review of Jordan's overall responses to questions by the state and defense counsel portrays the prevailing tenet that he was opposed to the death penalty and could not be a fair and impartial juror for the state. We therefore are of the opinion the trial court did not err in dismissing venireman Jordan for cause.

The appellant next contends there was error in granting State's instruction No. S-3 in that the Mississippi statutes on capital murder are unconstitutional. Under the decisions in Bullock v. State, 391 So. 2d 601 (Miss. 1981) and Coleman v. State, 378 So. 2d 640 (Miss. 1979), this assignment of error is without merit.

In Tokman's third assignment for reversal he argues the trial court erred in restricting the cross-examination of State's witness Kellison concerning prior convictions and false statements made upon entering the United States Army. The witness was asked by defense counsel whether at the time of his enlistment he informed the Army of his convictions before he was 17 years of age to which Kellison replied that he told the recruiter but the convictions were not listed. Kellison was then asked whether he had to sign

something attesting to the truthfulness of the information he gave the Army and an objection based upon the inadmissibility of convictions under the Youth Act was sustained. From this exchange Tokman now contends the information was admissible as a material factor reflecting upon Kellison's truthfulness in his answers. The trial court questioned the materiality of such testimony and ruled that it was improper.

In Shanklin v. State, 290 So. 2d 625, 627 (Miss. 1974), we stated: "A defendant can, of course, question a witness to determine his credibility as a witness; but as to how far afield the testimony may be extended is largely within the sound discretion of the trial judge." We are presently of the opinion the trial court did not abuse its discretion in sustaining the objections to this testimony since, at best, it appears remote to the witnesses present credibility.

It is next contended there was error in admitting as an aggravating circumstance during the sentencing phase of the trial a record of Tokman's armed robbery conviction on February 20, 1981, the robbery having been committed one day after the murder of Taylor. He argues the aggravating circumstance was improper under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1982), because the statute reads "The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person," (Emphasis added). He emphasizes the statute refers to a conviction prior to the commission of the act for which he was being sentenced and therefore was inadmissible.

We addressed the identical question in Leatherwood v. State, No. 53,914, (Miss., decided May 25, 1983 , not yet reported), as follows:

> This Court has ruled that "previously" means previous "to the time of the trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance." Jones v. State, 381 So. 2d 983, 994 (Miss. 1980); Reddix v. State, 381 So. 2d 999 (Miss. 1980) . . .

* * *

> Crimes committed by a defendant after having committed a capital offense have just as much or more bearing on the question of his character, criminal tendencies, and whether he should suffer the death penalty, as do crimes committed by him prior to having committed the capital offense.

We conclude this assignment is without merit.

The appellant next argues there was error in granting State's instruction S-4 because it permitted the jury to consider as aggravating circumstances, the murder was committed while Tokman was engaged in a robbery, was committed for pecuniary gain, and the homicide was especially heinous, atrocious or cruel. When the instructions were being considered by the trial court Tokman objected to S-4 only upon the grounds "that an aggravating circumstance is that capital murder was committed while the defendant was engaged in the commission of a robbery and that is an element of capital murder itself." We are required to consider only that portion of the assignment of error which is related to the objection. Leatherwood v. State, No. 53,914, supra; Smith v. State, 419 So. 2d 563 (Miss. 1982). However we address each.

It is contended however that Tokman was on trial for capital murder only because under Miss. Code Ann. § 97-3-19 (Supp. 1982), he killed Taylor while engaged in a robbery, and to instruct the jury that murder while committing robbery is an aggravating circumstance is tantamount to instructing the jury that after a finding of guilty, he already has one aggravating circumstance against him, sufficient to impose the death penalty.

Again, we find this contention was addressed in Leatherwood wherein we found the argument to be without merit under the following rationale:

> The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense - - i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.

> At the sentencing hearing appellant may put on evidence of mitigating circumstances of an unlimited nature pursuant to section 99-19-101 (6) (Supp. 1982) and Washington v. State, 361 So. 2d 61 (1970), so as to convince the jury that he should not be executed.

Of course a jury in a capital case must find the defendant guilty of the attendant crime before the homicide attains capital status. Because it is an essential adjunct to the finding of guilty of capital murder, it becomes a relevant aggravating circumstance, in our opinion, to be considered by the jury in determining the sentence and as such it is not error.

It is additionally urged that instruction S-4 was improper because it permitted the jury to consider as an aggravating circumstance that the capital murder was committed for pecuniary gain. The thrust of this argument is the instruction permits the doubling of aggravating circumstances (saying the same thing twice) when the evidence would permit only one aggravating circumstance. Section 99-19-101(5)(d) lists robbery as an aggravating circumstance which in conjunction with a homicide will elevate it to capital murder. Sub-section (f) gives the aggravating circumstance, "The capital offense was committed for pecuniary gain," the same potential of elevating a homicide to capital murder. But we think an indictment, as here, charging capital murder in the course of a robbery permits instructions on both "robbery" and "pecuniary gain" as aggravating circumstances because the evidence supports both as it reveals the robbery was committed for pecuniary gain during the course of which the homicide occurred. They are inextricably intertwined in this case in our opinion. We gather from the argument there is a belief in some segments of the bar that the death sentence is imposed or is not imposed numerically.[1] However, this belief is contrary to § 99-19-101(2)(b) which provides for a "weighing" by the jury of the aggravating and mitigating

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[1] I.e., two aggravating circumstances and one mitigating circumstance require the imposition of the death sentence or conversely one aggravating circumstance and two mitigating circumstances require a life sentence.

circumstances in the sentencing phase and our decisions accord with this directive.

In Coleman v. State, 378 So. 2d 640, 646 (Miss. 1979), we held among other things the following,

> Subsection 5 of § 99-19-101 limits the aggravating circumstances to eight, but proof of one or more of these aggravating circumstances may still be found insufficient by the jury to require death. Throughout the trial on the sentencing phase, the state carries the burden of showing not only that aggravating circumstances exists but also that they are sufficient enough to warrant death. If the state merely proves the existence of an aggravating circumstance, the jury is free to find it insufficient to warrant death and is not required to automatically impose death.

We conclude there was no error in instruction S-4 arising from the aggravating circumstance of murder for "pecuniary gain."

Another argument is directed to instruction S-4 in that it permits the jury to find an aggravating circumstance if they believed the capital offense was especially heinous, atrocious, or cruel because these words are unconstitutionally vague and ambiguous. This point was the subject of discussion in Washington v. State, 361 So. 2d 61 (Miss. 1978), wherein we held:

> We must remember that the twelve members of the trial jury were a jury of the defendant's peers, and came from the county of the defendant's residence. The jury was composed of average citizens possessing average intelligence, a cross-section, if you please, of the citizenry of the community. In our opinion the words "especially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words. He comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio or the prese.
>
> * * *
>
> The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.
>
> It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.
>
> 361 So. 2d at 65-6.

This holding was reaffirmed in Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979). More recently it was again addressed in

Hezekiah Edwards v. State, No. 53,800, (Miss., Decided 3/16/83, not yet reported). The author of this opinion joined the dissent of Justice Prather in her reasoning and belief that the language is vague. However, a majority of the court ruled otherwise and I presently yield to their views. Overall we are of the opinion instruction S-4 was not erroneously given and did not prejudice the appellant.

We are buttressed in the above determinations by a countervailing instruction which was granted. It follows, "You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment." The jury was thus informed they could disregard all aggravating circumstances, even in the absence of mitigating circumstances, and return a sentence of life imprisonment if they believe it was warranted. We therefore think Tokman's contention on all points in this assignment of error are without merit.

The finding of the jury that the capital murder was especially heinous, atrocious or cruel is urged by the appellant as being without evidentiary foundation and contrary to the overwhelming weight of the evidence, as appellant's next assignment of error.

The evidence, in our opinion, supports the jury's verdict that the murder was especially heinous, atrocious or cruel where the testimony reveals without contradiction that the homicide was the result of deliberate plan, where the victim was pulled from the driver's seat of his cab into the back seat by a rope around his neck, where he struggled for some several minutes while being driven to the rear of the cinema and where he was bludgeoned to death by a knife which at some point during the struggle closed on the assailant's hand. Moreover the jury found the murder was committed while the defendant was engaged in the commission of a robbery, was committed for pecuniary gain and was committed for the purpose of avoiding lawful arrest, which in addition to the aggravating circumstances previously mentioned was supported by the evidence in our opinion. We stated in Evans v. State, 422 So.

2d 737, 743 (Miss. 1982), "Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence." Therefore, we think this assignment for reversal is without merit.

The jury's finding that the capital murder was committed for the purpose of avoiding lawful arrest is next contended by appellant to be without evidentiary foundation and against the overwhelming weight of the evidence. In our opinion the following testimony of Fusón, a witness for the state, completely refutes this argument.

"[Fuson]

A. It was Mike Leatherwood's idea about a witness. He didn't want to leave a witness.

[Peters]

Q. So, it was your idea first that there would be a robbery.

A. Right.

Q. Whose idea was it next about whether to kill the witness?

A. Well, I believe Mike Leatherwood and David Tokman decided that. You know, I was against killing the cab driver. I didn't really speak up but, you know, at that time, I was against killing the cab driver but I really didn't say anything against kill the cab driver.

Q. How long was it before the cab driver was called to the scene that they discussed killing him and to not leave a witness?

A. It wasn't very long. It couldn't have been more than forty-five minutes."

In Leatherwood we held that the jury could properly consider such evidence, "[i]f there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover their tracks' so as to avoid apprehension and eventual arrest

by the authorities." It is, of course, also one of the aggravatin circumstances authorized by § 99-19-101(5)(e). We therefore think this assignment is without merit.

The trial court refused appellant's request for instruction D-11 which follows: "You are further instructed that there is nothing which would suggest that the decision to afford an individual Defendant mercy violates the laws of this state, or your oath as jurors." It is now contended that this was error.

In Bullock v. State, 391 So. 2d 601 (Miss. 1981), we stated:

> Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions. 391 So.2d at 610.

But conceding the refusal of the instruction as error for the following statement only, it was cured by the granting of the previously mentioned instruction which states, "You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment." The refusal of the instruction was not error.

The next assignment of error also concerns the refusal of an instruction, D-14, requested by the appellant. The trial court found instruction D-14 to be repetitious to instruction S-4 which was granted at the state's request. Both instructions contain statements that mitigating circumstances are not limited to those read to the jury. When the state objected to the instruction on the ground of repetition the only statement made by Tokman's counsel for the instruction's allowance was,"The defense does not think it would hurt to let them know that one more time." Perhaps so, but in Ragen v. State, 318 So. 2d 879, 882 (Miss. 1975), we stated, "[t]he trial court is not required to grant several instructions on the same question in a different verbiage." We

think this is the proper rule of law and note further that instruction D-12, obtained by the defendant, in effect states the jury need not find any mitigating circumstances in order to sentence Tokman to life imprisonment. It negated any prejudice or harm which might have resulted from refusing instruction D-14.

Tokman's final contention is the sentence of death imposed by the jury was contrary to the weight of the evidence and disporportionately severe for the crime committed.

Defense counsel vigorously argued in mitigation of the death penalty that Tokman was only seventeen years of age at the time of the homicide and eighteen at the time of trial and because of his immaturity advised them that if he took the stand to testify in his own behalf he would tell the jury that he wanted to die. The attorneys further call to our attention that the record is void of any previous anti-social behavior by Tokman other than that at the time of this murder and robbery.

In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), the United States Supreme Court reversed and remanded that cause based upon the imposition of the death penalty upon a youth, sixteen at the time he committed the murder, where the trial court refused to consider, as offered by the youth, mitigating circumstances of the youth's "unhappy upbringing and emotional disturbance." 455 U.S. at 109. It need be observed that the Court did not hold that a minor, because of his youth, may not be sentenced to death, but stated:

> All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 116.

In this case there is no testimony of mitigating circumstances arising from a troubled upbringing or of emotionally disturbed behavior. There is a statement by defense counsel to the court in the absence of the jury that Tokman's mother did not desire

to attend the trial because she had laryngitis and was involved in a divorce proceeding, thereby acknowledging some indifference to his plight, we suppose, but hardly sufficient to establish a disturbed and emotional background to mitigate the death sentence. Moreover Tokman was examined by competent medical authorities and was found to be without psychosis. As author of this opinion I find it deeply disturbing that the life of a youth should be taken in punishment for his crime, the justification for it being that it is the law of this state which dictates the result if due process is afforded. Our review and study of the record discloses no reversible error arising from either misapplication of the law or facts. Indeed it reveals that due proces a fair trial in all aspects was afforded the defendant.

As mentioned we have reviewed the record and compared the death sentence with all decisions of this Court beginning with Jackson v. State, 337 So. 2d 1242 (Miss. 1976), involving the death penalty. Most cases, 19, have been affirmed and few, 2, have been reversed. We conclude the death penalty for George David Tokman is not disproportionate, wanton or freakish when compared to other capital cases, their facts, these facts and the defendant. We are of the opinion from the evidence and the comparison, that the death penalty imposed by the jury is not excessive in relation to the aggravating and mitigating circumstances presented to it.

We also conclude the death sentence was not imposed because of the influence of passion, prejudice or any other arbitrary factor, and, the evidence supports the jury's finding of statutory aggravating circumstances in that the homicide was committed while the defendant was engaged in the crime of robbery, was for pecuniary gain, was for the purpose of avoiding lawful arrest, and was especially heinous, atrocious and cruel. The execution of Tokman will be consistent and even-handed when compared with all

post Jackson death penalty cases considered by this Court.[2]

The judgment of the lower court is affirmed and Wednesday, July 27, 1983, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED.

WALKER, P.J.; BROOM, P.J.; ROY NOBLE LEE; BOWLING; PRATHER; AND ROBERTSON, JJ., CONCUR. HAWKINS AND DAN LEE, JJ., DISSENT.

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[2] See Appendix "A".

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

Leatherwood v. State, (No. 53,914, decided May 25, 1983, but not yet reported).

Hill v. State, (No. 53,795, decided May 4, 1983, but not yet reported).

Pruett v. State, (No. 54,000, decided February 23, 1983, but not yet reported).

Gilliard v. State, 428 So. 2d 576 (Miss. 1983).

Evans v. State, 422 So. 2d 737 (Miss. 1982).

King v. State, 421 So. 2d 1009 (Miss. 1982).

Wheat v. State, 420 So. 2d 229 (Miss. 1982).

Smith v. State, 419 So. 2d 563 (Miss. 1982).

Edwards v. State, 413 So. 2d 1007 (Miss. 1982).

Johnson v. State, 416 So. 2d 383 (Miss. 1982).

Bullock v. State, 391 So. 2d 601 (Miss. 1980).

Reddix v. State, 381 So. 2d 999 (Miss. 1980).

Jones v. State, 381 So. 2d 983 (Miss. 1980).

Culberson v. State, 379 So. 2d 499 (Miss. 1979).

Gray v. State, 375 So. 2d 994 (Miss. 1979).

Jordan v. State, 365 So. 2d 1198 (Miss. 1978).

Voyles v. State, 362 So. 2d 1236 (Miss. 1978).

Irving v. State, 361 So. 2d 1360 (Miss. 1978).

Washington v. State, 361 So. 2d 61 (Miss. 1978).

Bell v. State, 360 So. 2d 1206 (Miss. 1978).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT.

Edwards v. State, (No. 53,800, decided March 16, 1983, but not yet reported).

Coleman v. State, 378 So. 2d 640 (Miss. 1979).

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,676

GEORGE DAVID TOKMAN

v.

STATE OF MISSISSIPPI

HAWKINS, JUSTICE, DISSENTING:

I respectfully dissent, and would remand this case to the circuit court for a mandatory sentence of life imprisonment.

In the sentencing phase of this trial, after the state rested, the following developed in chambers:

BY MR. MOORE [counsel for defense]:

> Let the record show that, upon completion of the State's case, and a conference with David Tokman, that it has been decided not to place him on the witness stand for the reason that he would not assure his counsel or promise his counsel that he would not tell the jury that he would prefer the death penalty rather than serve time in Parchman. Is that correct, David?

BY THE DEFENDANT:

> Yes, sir.

BY MR. MOORE:

> Is there anything else you would like to add to that?

BY THE DEFENDANT:

> No, sir.

BY MR. TAYLOR [counsel for defendant]:

> We would also like for the record to reflect that Judge Moore and I have both conferred with David extensively in an effort to determine if there was anyone, including family members, that he knew of who would be able to give aid and

> assistance to him by testifying for him in the sentencing phase of this trial and we are of the conclusion that there are none. I would further like to state for the record that, prior to the beginning of the trial, David's mother was contacted in Dearborn, Michigan and asked to come to Jackson to testify for her son in the sentencing phase of this trial, if necessary. She declined on the grounds that she had laryngitis and was going through a divorce.

(R. 567-68).

While not revealed in this record, the record in the companion case of Leatherwood v. State, No. 53,914 (Miss. May 25, 1983), indicates that Tokman's military commanding officer at Fort Polk was aware Tokman had undergone psychiatric treatment. The nature or extent of this was never developed. (Leatherwood Record, pp. 669-70).

The absence of any evidence going to Tokman's rearing, training, or background is serious, in my view. Had the circuit judge, in the absence of a jury, been considering the penalty to be imposed in this case, it is inconceivable that he would not have required a pre-sentence investigation and report in which the entire background of Tokman would have been thoroughly explored. Indeed, Eddings v. Oklahoma, 455 U.S. 104 (1982), holds that the circuit judge may not ignore the background of an accused in a death penalty case.

From the record before us, we cannot know whether such non-disclosure was beneficial or harmful to Tokman. He was represented by able, intelligent counsel who may have had excellent reason for not offering any evidence on Tokman's background.

The record does reveal a mother whose absence of care or concern for her child was both unnatural and sickening. The Leatherwood record indicates some psychological problem in his background. Further, the record reveals the bravado Tokman showed before his associates coming apart at the seams in court chambers when his counsel informed the trial judge that the reason they did not put him on the witness stand was because

of the danger of his telling the jury he preferred the death penalty. Thus did the hater finally recognize the prime object of his hatred: himself.

Eddings contains some apt comment on youth:

> But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id. at 115-16 (footnotes and citation omitted).

Tokman was seventeen when he commited this crime. Because of his age, and what the record does reveal about his background, I would remand this case to the circuit court with directions to impose a sentence of life imprisonment. This generally is consistent with the statements I made in Leatherwood, which will not be repeated here.

DAN LEE, J., JOINS THIS DISSENT.

RELEVANT MISSISSIPPI STATUTE

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5)and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

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(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) the defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

83-6452

IN THE SUPREME COURT OF MISSISSIPPI

No. #53,676

WEDNESDAY, AUGUST 17, 1983, COURT SITTING : : : : : : : : :

GEORGE DAVID TOKMAN

vs.

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST

A True Copy

This the 22nd day of Aug 1983

ROBERT L. WOMACK, CLERK

SUPREME COURT OF MISSISSIPPI

By [illegible]

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83-6452

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

GEORGE DAVID TOKMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, George David Tokman, who is now held in the penitentiary of the State of Mississippi, moves for leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner previously sought and was granted leave to proceed in forma pauperis in the Supreme Court of the State of Mississippi. The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

John W. Karr
925 Washington Building
Washington, D.C. 20005
737-3544
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

GEORGE DAVID TOKMAN,
Petitioner

v.

THE STATE OF MISSISSIPPI,
Respondent

CA 84-_____

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, George David Tokman, being first duly sworn, depose and say that I am the petitioner in the above styled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. NO

   b. I have been incarcerated under sentence of death since September 10, 1981, and have not been employed since before that time.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. NO

3. Do you own any cash or checking or savings account?

   a. NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

George David Tokman
GEORGE DAVID TOKMAN

State of Mississippi
County of Sunflower

Subscribed and sworn to before me this 15 day of March, 1984.

Jeff L. Porter
NOTARY PUBLIC

My Commission Expires Jan. 23 1985